year for each quarter in which that person was a residual interest holder. Quarterly notice to the Internal Revenue Service is not required.

(f) *Information returns for persons engaged in a trade or business.* See § 1.6041–1(b)(2) for the treatment of a REMIC under sections 6041 and 6041A.

[T.D. 8366, 56 FR 49516, Sept. 30, 1991, as amended by T.D. 8458, 57 FR 61306, Dec. 24, 1992; 58 FR 8098, Feb. 11, 1993]

§ 1.860G–1 Definition of regular and residual interests.

(a) *Regular interest*—(1) *Designation as a regular interest.* For purposes of section 860G(a)(1), a REMIC designates an interest as a regular interest by providing to the Internal Revenue Service the information specified in § 1.860D–1(d)(2)(ii) in the time and manner specified in § 1.860D–1(d)(2).

(2) *Specified portion of the interest payments on qualified mortgages*—(i) *In general.* For purposes of section 860G(a)(1)(B)(ii), a specified portion of the interest payments on qualified mortgages means a portion of the interest payable on qualified mortgages, but only if the portion can be expressed as—

(A) A fixed percentage of the interest that is payable at either a fixed rate or at a variable rate described in paragraph (a)(3) of this section on some or all of the qualified mortgages;

(B) A fixed number of basis points of the interest payable on some or all of the qualified mortgages; or

(C) The interest payable at either a fixed rate or at a variable rate described in paragraph (a)(3) of this section on some or all of the qualified mortgages in excess of a fixed number of basis points or in excess of a variable rate described in paragraph (a)(3) of this section.

(ii) *Specified portion cannot vary.* The portion must be established as of the startup day (as defined in section 860G(a)(9) and § 1.860G–2(k)) and, except as provided in paragraph (a)(2)(iii) of this section, it cannot vary over the period that begins on the startup day and ends on the day that the interest holder is no longer entitled to receive payments.

(iii) *Defaulted or delinquent mortgages.* A portion is not treated as varying over time if an interest holder's entitlement to a portion of the interest on some or all of the qualified mortgages is dependent on the absence of defaults or delinquencies on those mortgages.

(iv) *No minimum specified principal amount is required.* If an interest in a REMIC consists of a specified portion of the interest payments on the REMIC's qualified mortgages, no minimum specified principal amount need be assigned to that interest. The specified principal amount can be zero.

(v) *Specified portion includes portion of interest payable on regular interest.* (A) The specified portions that meet the requirements of paragraph (a)(2)(i) of this section include a specified portion that can be expressed as a fixed percentage of the interest that is payable on some or all of the qualified mortgages where—

(*1*) Each of those qualified mortgages is a regular interest issued by another REMIC; and

(*2*) With respect to that REMIC in which it is a regular interest, each of those regular interests bears interest that can be expressed as a specified portion as described in paragraph (a)(2)(i)(A), (B), or (C) of this section.

(B) See § 1.860A–1(a) for the effective date of this paragraph (a)(2)(v).

(vi) *Examples.* The following examples, each of which describes a pass-thru trust that is intended to qualify as a REMIC, illustrate the provisions of this paragraph (a)(2).

Example 1. (i) A sponsor transferred a pool of fixed rate mortgages to a trustee in exchange for two classes of certificates. The Class A certificate holders are entitled to all principal payments on the mortgages and to interest on outstanding principal at a variable rate based on the current value of One-Month LIBOR, subject to a lifetime cap equal to the weighted average rate payable on the mortgages. The Class B certificate holders are entitled to all interest payable on the mortgages in excess of the interest paid on the Class A certificates. The Class B certificates are subordinate to the Class A certificates so that cash flow shortfalls due to defaults or delinquencies on the mortgages will be borne first by the Class B certificate holders.

(ii) The Class B certificate holders are entitled to all interest payable on the pooled mortgages in excess of a variable rate described in paragraph (a)(3)(vi) of this section. Moreover, the portion of the interest payable to the Class B certificate holders is not treated as varying over time solely because payments on the Class B certificates may be reduced as a result of defaults or delinquencies on the pooled mortgages. Thus, the Class B certificates provide for interest payments that consist of a specified portion of the interest payable on the pooled mortgages under paragraph (a)(2)(i)(C) of this section.

Example 2. (i) A sponsor transferred a pool of variable rate mortgages to a trustee in exchange for two classes of certificates. The mortgages call for interest payments at a variable rate based on the current value of the One-Year Constant Maturity Treasury Index (hereinafter ''CMTI'') plus 200 basis points, subject to a lifetime cap of 12 percent. Class C certificate holders are entitled to all principal payments on the mortgages and interest on the outstanding principal at a variable rate based on the One-Year CMTI plus 100 basis points, subject to a lifetime cap of 12 percent. The interest rate on the Class C certificates is reset at the same time the rate is reset on the pooled mortgages.

(ii) The Class D certificate holders are entitled to all interest payments on the mortgages in excess of the interest paid on the Class C certificates. So long as the One-Year CMTI is at 10 percent or lower, the Class D certificate holders are entitled to 100 basis points of interest on the pooled mortgages. If, however, the index exceeds 10 percent on a reset date, the Class D certificate holders' entitlement shrinks, and it disappears if the index is at 11 percent or higher.

(iii) The Class D certificate holders are entitled to all interest payable on the pooled mortgages in excess of a qualified variable rate described in paragraph (a)(3) of this section. Thus, the Class D certificates provide for interest payments that consist of a specified portion of the interest payable on the qualified mortgages under paragraph (a)(2)(i)(C) of this section.

Example 3. (i) A sponsor transferred a pool of fixed rate mortgages to a trustee in exchange for two classes of certificates. The fixed interest rate payable on the mortgages varies from mortgage to mortgage, but all rates are between 8 and 10 percent. The Class E certificate holders are entitled to receive all principal payments on the mortgages and interest on outstanding principal at 7 percent. The Class F certificate holders are entitled to receive all interest on the mortgages in excess of the interest paid on the Class E certificates.

(ii) The Class F certificates provide for interest payments that consist of a specified portion of the interest payable on the mortgages under paragraph (a)(2)(i) of this section. Although the portion of the interest payable to the Class F certificate holders varies from mortgage to mortgage, the interest payable can be expressed as a fixed percentage of the interest payable on each particular mortgage.

(3) *Variable rate.* A regular interest may bear interest at a variable rate. For purposes of section 860G(a)(1)(B)(i), a variable rate of interest is a rate described in this paragraph (a)(3).

(i) *Rate based on current interest rate.* A qualified floating rate as defined in §1.1275–5(b)(1) (but without the application of paragraph (b)(2) or (3) of that section) set at a current value, as defined in §1.1275–5(a)(4), is a variable rate. In addition, a rate equal to the highest, lowest, or average of two or more qualified floating rates is a variable rate. For example, a rate based on the average cost of funds of one or more financial institutions is a variable rate.

(ii) *Weighted average rate*—(A) *In general.* A rate based on a weighted average of the interest rates on some or all of the qualified mortgages held by a REMIC is a variable rate. The qualified mortgages taken into account must, however, bear interest at a fixed rate or at a rate described in this paragraph (a)(3). Generally, a weighted average interest rate is a rate that, if applied to the aggregate outstanding principal balance of a pool of mortgage loans for an accrual period, produces an amount of interest that equals the sum of the interest payable on the pooled loans for that accrual period. Thus, for an accrual period in which a pool of mortgage loans comprises $300,000 of loans bearing a 7 percent interest rate and $700,000 of loans bearing a 9.5 percent interest rate, the weighted average rate for the pool of loans is 8.75 percent.

(B) *Reduction in underlying rate.* For purposes of paragraph (a)(3)(ii)(A) of this section, an interest rate is considered to be based on a weighted average rate even if, in determining that rate, the interest rate on some or all of the qualified mortgages is first subject to a cap or a floor, or is first reduced by a number of basis points or a fixed percentage. A rate determined by taking a weighted average of the interest rates on the qualified mortgage loans net of any servicing spread, credit enhancement fees, or other expenses of the REMIC is a rate based on a weighted average rate for the qualified mortgages. Further, the amount of any rate reduction described above may vary from mortgage to mortgage.

(iii) *Additions, subtractions, and multiplications.* A rate is a variable rate if it is—

(A) Expressed as the product of a rate described in paragraph (a)(3)(i) or (ii) of this section and a fixed multiplier;

(B) Expressed as a constant number of basis points more or less than a rate described in paragraph (a)(3)(i) or (ii) of this section; or

(C) Expressed as the product, plus or minus a constant number of basis points, of a rate described in paragraph (a)(3)(i) or (ii) of this section and a fixed multiplier (which may be either a positive or a negative number).

(iv) *Caps and floors.* A rate is a variable rate if it is a rate that would be described in paragraph (a)(3)(i) through (iii) of this section except that it is—

(A) Limited by a cap or ceiling that establishes either a maximum rate or a maximum number of basis points by which the rate may increase from one accrual or payment period to another or over the term of the interest; or

(B) Limited by a floor that establishes either a minimum rate or a maximum number of basis points by which the rate may decrease from one accrual or payment period to another or over the term of the interest.

(v) *Funds-available caps*—(A) *In general.* A rate is a variable rate if it is a rate that would be described in paragraph (a)(3)(i) through (iv) of this section except that it is subject to a ''funds-available'' cap. A funds-available cap is a limit on the amount of interest to be paid on an instrument in any accrual or payment period that is based on the total amount available for the distribution, including both principal and interest received by an issuing entity on some or all of its qualified mortgages as well as amounts held in a reserve fund. The term ''funds-available cap'' does not, however, include any cap or limit on interest payments used as a device to avoid the standards of paragraph (a)(3)(i) through (iv) of this section.

(B) *Facts and circumstances test.* In determining whether a cap or limit on interest payments is a funds-available cap within the meaning of this section and not a device used to avoid the standards of paragraph (a)(3)(i) through (iv) of this section, one must consider all of the facts and circumstances. Facts and circumstances that must be taken into consideration are—

(*1*) Whether the rate of the interest payable to the regular interest holders is below the rate payable on the REMIC's qualified mortgages on the start-up day; and

(*2*) Whether, historically, the rate of interest payable to the regular interest holders has been consistently below that payable on the qualified mortgages.

(C) *Examples.* The following examples, both of which describe a pass-thru trust that is intended to qualify as a REMIC, illustrate the provisions of this paragraph (a)(3)(v).

Example 1. (i) A sponsor transferred a pool of mortgages to a trustee in exchange for two classes of certificates. The pool of mortgages has an aggregate principal balance of $100*x*. Each mortgage in the pool provides for interest payments based on the eleventh district cost of funds index (hereinafter COFI) plus a margin. The initial weighted average rate for the pool is COFI plus 200 basis points. The trust issued a Class X certificate that has a principal amount of $100*x* and that provides for interest payments at a rate equal to One-Year LIBOR plus 100 basis points, subject to a cap described below. The Class R certificate, which the sponsor designated as the residual interest, entitles its holder to all funds left in the trust after the Class X certificates have been retired. The Class R certificate holder is not entitled to current distributions.

(ii) At the time the certificates were issued, COFI equalled 4.874 percent and One-Year LIBOR equalled 3.375 percent. Thus, the initial weighted average pool rate was 6.874 percent and the Class X certificate rate was 4.375 percent. Based on historical data, the sponsor does not expect the rate paid on the Class X certificate to exceed the weighted average rate on the pool.

(iii) Initially, under the terms of the trust instrument, the excess of COFI plus 200 over One-Year LIBOR plus 100 (excess interest) will be applied to pay expenses of the trust, to fund any required reserves, and then to reduce the principal balance on the Class X certificate. Consequently, although the aggregate principal balance of the mortgages initially matched the principal balance of the Class X certificate, the principal balance on the Class X certificate will pay down faster than the principal balance on the mortgages as long as the weighted average rate on the mortgages is greater than One-Year LIBOR plus 100. If, however, the rate on the Class X certificate (One-Year LIBOR plus 100) ever exceeds the weighted average rate on the mortgages, then the Class X certificate holders will receive One-Year LIBOR plus 100 subject to a cap based on the current funds that are available for distribution.

(iv) The funds available cap here is not a device used to avoid the standards of paragraph (a)(3) (i) through (iv) of this section. First, on the date the Class X certificates were issued, a significant spread existed between the weighted average rate payable on the mortgages and the rate payable on the Class X certificate. Second, historical data suggest that the weighted average rate payable on the mortgages will continue to exceed the rate payable on the Class X certificate. Finally, because the excess interest will be applied to reduce the outstanding principal balance of the Class X certificate more rapidly than the outstanding principal balance on the mortgages is reduced, One-Year LIBOR plus 100 basis points would have to exceed the weighted average rate on the mortgages by an increasingly larger amount before the funds available cap would be triggered. Accordingly, the rate paid on the Class X certificates is a variable rate.

Example 2. (i) The facts are the same as those in *Example 1,* except that the pooled mortgages are commercial mortgages that provide for interest payments based on the gross profits of the mortgagors, and the rate on the Class X certificates is 400 percent on One-Year LIBOR (a variable rate under paragraph (a)(3)(iii) of this section), subject to a cap equal to current funds available to the trustee for distribution.

(ii) Initially, 400 percent of One-Year LIBOR exceeds the weighted average rate payable on the mortgages. Furthermore, historical data suggest that there is a significant possibility that, in the future, 400 percent of One-Year LIBOR will exceed the weighted average rate on the mortgages.

(iii) The facts and circumstances here indicate that the use of 400 percent of One-Year LIBOR with the above-described cap is a device to pass through to the Class X certificate holder contingent interest based on mortgagor profits. Consequently, the rate paid on the Class X certificate here is not a variable rate.

(vi) *Combination of rates.* A rate is a variable rate if it is based on—

(A) One fixed rate during one or more accrual or payment periods and a different fixed rate or rates, or a rate or rates described in paragraph (a)(3) (i) through (v) of this section, during other accrual or payment periods; or

(B) A rate described in paragraph (a)(3) (i) through (v) of this section during one or more accrual or payment periods and a fixed rate or rates, or a different rate or rates described in paragraph (a)(3) (i) through (v) of this section in other periods.

(4) *Fixed terms on the startup day.* For purposes of section 860G(a)(1), a regular interest in a REMIC has fixed terms on the startup day if, on the startup day, the REMIC's organizational documents irrevocably specify—

(i) The principal amount (or other similar amount) of the regular interest;

(ii) The interest rate or rates used to compute any interest payments (or other similar amounts) on the regular interest; and

(iii) The latest possible maturity date of the interest.

(5) *Contingencies prohibited.* Except for the contingencies specified in paragraph (b)(3) of this section, the principal amount (or other similar amount) and the latest possible maturity date of the interest must not be contingent.

(b) *Special rules for regular interests*—(1) *Call premium.* An interest in a REMIC does not qualify as a regular interest if the terms of the interest entitle the holder of that interest to the payment of any premium that is determined with reference to the length of time that the regular interest is outstanding and is not described in paragraph (b)(2) of this section.

(2) *Customary prepayment penalties received with respect to qualified mortgages.* An interest in a REMIC does not fail to qualify as a regular interest solely because the REMIC's organizational documents provide that the REMIC must allocate among and pay to its regular interest holders any customary prepayment penalties that the REMIC receives with respect to its qualified mortgages. Moreover, a REMIC may allocate prepayment penalties among its classes of interests in any manner specified in the REMIC's organizational documents. For example, a REMIC could allocate all or substantially all of a prepayment penalty that it receives to holders of an interest-only class of interests because that class

would be most significantly affected by prepayments.

(3) *Certain contingencies disregarded.* An interest in a REMIC does not fail to qualify as a regular interest solely because it is issued subject to some or all of the contingencies described in paragraph (b)(3) (i) through (vi) of this section.

(i) *Prepayments, income, and expenses.* An interest does not fail to qualify as a regular interest solely because—

(A) The timing of (but not the right to or amount of) principal payments (or other similar amounts) is affected by the extent of prepayments on some or all of the qualified mortgages held by the REMIC or the amount of income from permitted investments (as defined in § 1.860G–2(g)); or

(B) The timing of interest and principal payments is affected by the payment of expenses incurred by the REMIC.

(ii) *Credit losses.* An interest does not fail to qualify as a regular interest solely because the amount or the timing of payments of principal or interest (or other similar amounts) with respect to a regular interest is affected by defaults on qualified mortgages and permitted investments, unanticipated expenses incurred by the REMIC, or lower than expected returns on permitted investments.

(iii) *Subordinated interests.* An interest does not fail to qualify as a regular interest solely because that interest bears all, or a disproportionate share, of the losses stemming from cash flow shortfalls due to defaults or delinquencies on qualified mortgages or permitted investments, unanticipated expenses incurred by the REMIC, lower than expected returns on permitted investments, or prepayment interest shortfalls before other regular interests or the residual interest bear losses occasioned by those shortfalls.

(iv) *Deferral of interest.* An interest does not fail to qualify as a regular interest solely because that interest, by its terms, provides for deferral of interest payments.

(v) *Prepayment interest shortfalls.* An interest does not fail to qualify as a regular interest solely because the amount of interest payments is affected by prepayments of the underlying mortgages.

(vi) *Remote and incidental contingencies.* An interest does not fail to qualify as a regular interest solely because the amount or timing of payments of principal or interest (or other similar amounts) with respect to the interest is subject to a contingency if there is only a remote likelihood that the contingency will occur. For example, an interest could qualify as a regular interest even though full payment of principal and interest on that interest is contingent upon the absence of significant cash flow shortfalls due to the operation of the Soldiers and Sailors Civil Relief Act, 50 U.S.C. app. 526 (1988).

(4) *Form of regular interest.* A regular interest in a REMIC may be issued in the form of debt, stock, an interest in a partnership or trust, or any other form permitted by state law. If a regular interest in a REMIC is not in the form of debt, it must, except as provided in paragraph (a)(2)(iv) of this section, entitle the holder to a specified amount that would, were the interest issued in debt form, be identified as the principal amount of the debt.

(5) *Interest disproportionate to principal*—(i) *In general.* An interest in a REMIC does not qualify as a regular interest if the amount of interest (or other similar amount) payable to the holder is disproportionately high relative to the principal amount or other specified amount described in paragraph (b)(4) of this section (specified principal amount). Interest payments (or other similar amounts) are considered disproportionately high if the issue price (as determined under paragraph (d) of this section) of the interest in the REMIC exceeds 125 percent of its specified principal amount.

(ii) *Exception.* A regular interest in a REMIC that entitles the holder to interest payments consisting of a specified portion of interest payments on qualified mortgages qualifies as a regular interest even if the amount of interest is disproportionately high relative to the specified principal amount.

(6) *Regular interest treated as a debt instrument for all Federal income tax purposes.* In determining the tax under chapter 1 of the Internal Revenue Code,

a REMIC regular interest (as defined in section 860G(a)(1)) is treated as a debt instrument that is an obligation of the REMIC. Thus, sections 1271 through 1288, relating to bonds and other debt instruments, apply to a regular interest. For special rules relating to the accrual of original issue discount on regular interests, see section 1272(a)(6).

(c) *Residual interest.* A residual interest is an interest in a REMIC that is issued on the startup day and that is designated as a residual interest by providing the information specified in §1.860D–1(d)(2)(ii) at the time and in the manner provided in §1.860D–1(d)(2). A residual interest need not entitle the holder to any distributions from the REMIC.

(d) *Issue price of regular and residual interests*—(1) *In general.* The issue price of any REMIC regular or residual interest is determined under section 1273(b) as if the interest were a debt instrument and, if issued for property, as if the requirements of section 1273(b)(3) were met. Thus, if a class of interests is publicly offered, then the issue price of an interest in that class is the initial offering price to the public at which a substantial amount of the class is sold. If the interest is in a class that is not publicly offered, the issue price is the price paid by the first buyer of that interest regardless of the price paid for the remainder of the class. If the interest is in a class that is retained by the sponsor, the issue price is its fair market value on the pricing date (as defined in §1.860F–2(b)(3)(iii)), if any, or, if none, the startup day, regardless of whether the property exchanged therefor is publicly traded.

(2) *The public.* The term ''the public'' for purposes of this section does not include brokers or other middlemen, nor does it include the sponsor who acquires all of the regular and residual interests from the REMIC on the startup day in a transaction described in §1.860F–2(a).

[T.D. 8458, 57 FR 61306, Dec. 24, 1992; 58 FR 8098, Feb. 11, 1993; 58 FR 15089, Mar. 19, 1993; T.D. 8614, 60 FR 42787, Aug. 17, 1995]

§1.860G–2 Other rules.

(a) *Obligations principally secured by an interest in real property*—(1) *Tests for determining whether an obligation is principally secured.* For purposes of section 860G(a)(3)(A), an obligation is principally secured by an interest in real property only if it satisfies either the test set out in paragraph (a)(1)(i) or the test set out in paragraph (a)(1)(ii) of this section.

(i) *The 80-percent test.* An obligation is principally secured by an interest in real property if the fair market value of the interest in real property securing the obligation—

(A) Was at least equal to 80 percent of the adjusted issue price of the obligation at the time the obligation was originated (see paragraph (b)(1) of this section concerning the origination date for obligations that have been significantly modified); or

(B) Is at least equal to 80 percent of the adjusted issue price of the obligation at the time the sponsor contributes the obligation to the REMIC.

(ii) *Alternative test.* For purposes of section 860G(a)(3)(A), an obligation is principally secured by an interest in real property if substantially all of the proceeds of the obligation were used to acquire or to improve or protect an interest in real property that, at the origination date, is the only security for the obligation. For purposes of this test, loan guarantees made by the United States or any state (or any political subdivision, agency, or instrumentality of the United States or of any state), or other third party credit enhancement are not viewed as additional security for a loan. An obligation is not considered to be secured by property other than real property solely because the obligor is personally liable on the obligation.

(2) *Treatment of liens.* For purposes of paragraph (a)(1)(i) of this section, the fair market value of the real property interest must be first reduced by the amount of any lien on the real property interest that is senior to the obligation being tested, and must be further reduced by a proportionate amount of any lien that is in parity with the obligation being tested.

(3) *Safe harbor*—(i) *Reasonable belief that an obligation is principally secured.* If, at the time the sponsor contributes an obligation to a REMIC, the sponsor reasonably believes that the obligation